



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 21, 2004

Ms. Maleshia B. Farmer  
Assistant City Attorney  
City of Fort Worth  
1000 Throckmorton Street  
Fort Worth, Texas 76102

OR2004-8993

Dear Ms. Farmer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 211393.

The City of Fort Worth (the "city") received a request from two requestors for eight categories of information pertaining to certain "Code file[s]," investigations, and personnel documents. You state that the city will provide the requestors with some of the requested information. You claim that portions of the remaining requested information are excepted from disclosure pursuant to sections 552.101, 552.103, 552.117, and 552.130 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and have reviewed the submitted information.

You indicate that the information that you submitted to us for review as Exhibit H is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy.<sup>2</sup> Information is protected from disclosure

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<sup>1</sup> We note that although the city did not claim that any portion of the remaining requested information was excepted from disclosure under section 552.130 of the Government Code within ten business days of its receipt of the request for information, we will consider the city's claim under this exception to disclosure since such a claim constitutes a compelling interest that is sufficient to overcome any existing presumption that the portions of the remaining requested information to which this claim pertains are now public. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision Nos. 150 at 2 (1977), 319 (1982).

<sup>2</sup> Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by the common-law right to privacy.

by the common-law right to privacy if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, and is of no legitimate concern to the public. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976). In *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App.—El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigatory files at issue in *Ellen* contained individual witness and victim statements, an affidavit given by the individual accused of the misconduct in response to the allegations, and the conclusions of the board of inquiry that conducted the investigation. The court held that the names of witnesses and their detailed affidavits regarding allegations of sexual harassment are exactly the types of information specifically excluded from disclosure under the privacy doctrine as described in *Industrial Foundation*. See *Ellen*, 840 S.W.2d at 525. However, the court ordered the release of the affidavit of the person under investigation. See *id.* The *Ellen* court also ordered the disclosure of the summary of the investigation with the identities of the victims and witnesses deleted from the documents, noting that the public interest in the matter was sufficiently served by disclosure of such documents and that in that particular instance “the public [did] not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements.” *Id.* Thus, when there is an adequate summary of an investigation, the summary and any statements of the person under investigation must be released, but the identities of the victims and witnesses must be redacted and their detailed statements must be withheld from disclosure. However, when no adequate summary exists, detailed statements regarding the allegations must be released, but the identities of witnesses and victims must still be redacted from the statements.

We note that the matter that is associated with Exhibit H was at issue in Open Records Letter No. 2004-7894 (2004). In that letter ruling, we determined that the information that was submitted to us for review in that instance included an adequate summary of the sexual harassment investigation. Thus, we concluded that the summary and statements of the person accused of the harassment were not confidential and must be released to the requestor; however, information within those documents that identified the victims and witnesses was confidential under *Ellen* and must not be released to the requestor. We also concluded that the remaining submitted information that comprised the investigation file must be withheld from disclosure pursuant to section 552.101 in conjunction with the common-law right to privacy on the basis of *Ellen*. In this instance, we note that Exhibit H is an audiotape that documents the statement of the person who was accused of the harassment that was at issue in Open Records Letter No. 2004-7894 (2004). Thus, based on *Ellen*, we find that the portions of Exhibit H that identify the alleged victims and witnesses to the sexual harassment must be withheld from the requestors pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. However, we also find that no other portion of Exhibit H is confidential under the common-law right to privacy. Accordingly, we conclude that the city may not withhold any other portion of Exhibit H under section 552.101 of the Government Code in conjunction with the common-law right to privacy.

You claim that the information that you submitted to us for review as Exhibits D and F is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The city maintains the burden of providing relevant facts and documents to show that section 552.103 is applicable in this situation. The test for meeting this burden is a showing by the city that (1) litigation was pending or reasonably anticipated on the date that it received this request, and (2) the information at issue is related to that pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for the information at issue to be excepted from disclosure pursuant to section 552.103.

We note that the mere chance of litigation will not trigger section 552.103. *See Open Records Decision No. 452 at 4 (1986)*. In order to adequately demonstrate that litigation is reasonably anticipated, the city must furnish us with concrete evidence showing that litigation is realistically contemplated and is more than mere conjecture. *See id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986)*. This office has stated that a pending Equal Employment Opportunity Commission (the "EEOC") complaint indicates that litigation is reasonably anticipated. *See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982)*. Among the documents that you have submitted to us for review are two "Dismissal and Notice of Rights" from the EEOC, one dated June 22, 2004 and the other dated July 6, 2004. Each notice indicates that the complainant associated with each notice has the right to sue on the claim for ninety days following the date of receipt of the notice. You inform us that the city received the instant request for information on July 30, 2004, which is less than ninety days from the date of each notice. Thus, we find that litigation was reasonably anticipated against the city on the date that it received the instant request for information and that the information at issue is related to that anticipated litigation for purposes of section 552.103(a).

We note, however, that once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the potential opposing party in the anticipated litigation is generally not excepted from disclosure under section 552.103(a) and must be disclosed. We also note that Exhibit D contains orders of the city's Building Standards Commission (the "commission"). If these orders were adopted in a public meeting of the commission, then the city may not withhold them under section 552.103. *See* Open Records Decision No. 221 (1979) (statutory predecessor to Gov't Code § 552.103 not applicable to official records of governmental body's public proceedings). With that exception, the city may withhold Exhibits D and F pursuant to section 552.103 of the Government Code.<sup>3</sup> The applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

You claim that portions of the information that you submitted to us for review as Exhibit E are excepted from disclosure pursuant to section 552.117 of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(a)(1) if the employee did not request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality under section 552.024 was not made until after the request for information was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is received by the governmental body. *See* Open Records Decision No. 530 at 5 (1989). You indicate that the individuals with whom the section 552.117(a)(1) information in Exhibit E that we have marked is associated elected confidentiality for this information prior to the time that the city received this request. Accordingly, we conclude that the city must withhold this particular marked information pursuant to section 552.117(a)(1). We note that portions of Exhibit H also contain information that is subject to section 552.117(a)(1). Accordingly, we also conclude that the city must withhold this particular information pursuant to section 552.117(a)(1) of the Government Code to the extent that the individuals with whom the information is associated elected confidentiality for the information prior to the time that the city received this request.

Finally, you claim that portions of Exhibit E are excepted from disclosure pursuant to section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to a motor vehicle operator's or driver's license or permit issued by an agency of this state or a motor vehicle title or registration issued by an agency of this state.

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<sup>3</sup> Because we base our ruling with regard to Exhibit F on section 552.103 of the Government Code, we need not address your remaining claimed exception to disclosure concerning this particular information.

*See* Gov't Code § 552.130. Accordingly, we conclude that the city must withhold the Texas motor vehicle information that we have marked in Exhibit E pursuant to section 552.130 of the Government Code.

In summary, the city must withhold the information in Exhibit H that identifies the alleged victims and witnesses of the sexual harassment investigation pursuant to section 552.101 of the Government Code in conjunction with the common-law right to privacy. The city may withhold Exhibits D and F pursuant to section 552.103 of the Government Code, except for the orders of the commission to the extent that they were adopted at a public meeting. The city must withhold the portions of Exhibit E that we have marked pursuant to section 552.117(a)(1) of the Government Code. The city must also withhold the section 552.117(a)(1) information contained within Exhibit H pursuant to that exception to disclosure to the extent that the individuals with whom the information is associated elected confidentiality for the information prior to the time that the city received this request. The city must withhold the Texas motor vehicle information that we have marked in Exhibit E pursuant to section 552.130 of the Government Code. The city must release the remaining submitted information to the requestors to the extent that it has not already been released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).


If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/krl

Ref: ID# 211393

Enc. Marked documents

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(w/o enclosures)